United States Department of Labor
Employees' Compensation Appeals Board

W.R., Appellant	)	
and	)	**Docket No. 08-340**
	)	**Issued: June 19, 2008**
DEPARTMENT OF STATE, AMERICAN EMBASSY, Pretoria, South Africa, Employer	)	

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 9, 2007 appellant filed a timely appeal of the Office of Workers' Compensation Programs' merit decision dated May 3, 2007 and a nonmerit decision dated October 24, 2007. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

ISSUES

The issues are: (1) whether appellant has more than 18 percent impairment of each upper extremity for which he has received a schedule award; and (2) whether the Branch of Hearings and Review properly denied his request for an oral hearing as untimely.

FACTUAL HISTORY

On May 4, 1999 appellant, then a 51-year-old security engineer, filed a traumatic injury claim alleging that he injured his right leg, neck and head when he fell from a truck in the performance of duty on April 23, 1999. The Office accepted his claim for contusions of the right lower leg, neck and face on December 21, 1999. Appellant stated on December 1, 2000 that he

injured his shoulder on August 7, 1998 when he led rescue efforts following the bombing of the American Embassy in Nairobi, Kenya. The Office authorized a left shoulder arthroscopy and decompression on March 13, 2000. On May 4, 2001 the Office authorized a right shoulder arthroscopy and decompression with right shoulder excision of the lateral clavicle.

Appellant requested a schedule award on April 20, 2004. He submitted a report dated April 14, 2004 from Dr. Stan Zemankiewicz, a Board-certified orthopedic surgeon, who described appellant's activities on and after August 7, 1998 as well as his fall in April 1991. Dr. Zemankiewicz opined that appellant had reached maximum medical improvement. He found that appellant had 10 percent impairment secondary to loss of the distal clavicle and 10 percent insufficiency of the rotator cuff bilaterally. Dr. Zemankiewicz stated that appellant had 20 percent impairment to each shoulder and 20 percent impairment of the left upper extremity as well as 5 percent impairment of the whole person. He stated that appellant had a total 26 percent impairment of the whole person.

An Office medical adviser reviewed Dr. Zemankiewicz's report on May 6, 2004 and found that it did not comport with the Office's standards and that additional information was needed. The Office requested an additional report on May 7, 2004. Dr. Zemankiewicz responded on May 26, 2004 and opined that appellant reached maximum medical improvement on December 2, 2001. He stated that appellant had no atrophy, no loss of sensation and no ankylosis. Dr. Zemankiewicz found restricted range of motion in both shoulders due to rotator cuff tears and decompressions surgeries. He stated that appellant had 84 degrees of abduction on the left and 85 degrees on the right resulting in 9 percent impairment to each shoulder. Dr. Zemankiewicz also found that appellant had 90 degrees of flexion or 6 percent impairment. He accorded appellant three percent impairment due to facial injuries and headaches. The district medical director reviewed Dr. Zemankiewicz's report on June 24, 2004 and found that appellant had 15 percent impairment of each upper extremity due to loss of range of motion. The Office requested pay rate information from the employing establishment on September 14, 2004 and April 5, 2005.

The employing establishment approved appellant's application for disability retirement on January 18, 2005. Appellant filed a notice of recurrence of disability on March 6, 2005 alleging that he sustained a recurrence of disability on January 6, 2005 and that he stopped work on January 18, 2005. The Office responded on September 9, 2005 and informed appellant that his claim was open for medical treatment of his work-related conditions.

Appellant again requested a schedule award on January 25, 2006. He submitted reports from Dr. Zemankiewicz dated November 6, 2006 and January 24, 2007 addressing his range of motion. Dr. Zemankiewicz noted that appellant had 75 degrees of left shoulder abduction and 65 degrees of right shoulder abduction as well as 85 degrees of flexion and 45 degrees of extension bilaterally. Appellant demonstrated 16 degrees of external rotation on the right and 18 degrees on the left with internal rotation of 10 degrees bilaterally. Dr. Zemankiewicz opined that appellant had reached maximum medical improvement and noted his spinal impairments, whole body impairments and provided a lower extremity impairment of 10 percent. The Office medical adviser reviewed these reports on March 7, 2007 and found that appellant had 18 percent impairment to each upper extremity due to loss of range of motion. He noted that the Federal

Employees' Compensation Act did not recognize spinal impairment and that appellant had not established any lower extremity impairment.

By decision dated May 3, 2007, the Office granted appellant a schedule award for 18 percent impairment to each of his upper extremities. Appellant received $170.682.81 for the period April 3 through June 17, 2002.[1] He requested an oral hearing on September 11, 2007. By decision dated October 24, 2007, the Branch of Hearings and Review denied appellant's request for an oral hearing as untimely. The hearing representative noted that appellant's request for an oral hearing was not postmarked within 30 days of the Office's May 3, 2007 decision and stated that the issue in the case could equally well be addressed by requesting reconsideration and submitting evidence not previously considered which established that appellant was entitled to an increased schedule award.

LEGAL PRECEDENT -- ISSUE 1

The schedule award provision of the Act[2] and its implementing regulations[3] set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, the Act does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law to all claimants, good administrative practice necessitates the use of a single set of tables so that there may be uniform standards applicable to all claimants. The American Medical Association, *Guides to the Evaluation of Permanent Impairment* has been adopted by the implementing regulations as the appropriate standard for evaluating schedule losses.[4] Effective February 1, 2001, the Office adopted the fifth edition of the A.M.A., *Guides* as the appropriate edition for all awards issued after that date.[5]

ANALYSIS -- ISSUE 1

Appellant requested a schedule award and submitted reports from Dr. Zemankiewicz, a Board-certified orthopedic surgeon, who provided range of motion figures for appellant's upper extremities. The Office medical adviser reviewed these figures and provided correlation to the A.M.A., *Guides*. He found that appellant had 75 degrees of left shoulder abduction for, 5 percent impairment,[6] 65 degrees of right shoulder abduction for 5.5 percent impairment,[7] 85 degrees of

[1] Following the Office's May 3, 2007 decision, appellant submitted additional new evidence. As the Office did not consider this evidence in reaching a final decision, the Board may not review the evidence for the first time on appeal. *See* 20 C.F.R. § 501.2(c).

[2] 5 U.S.C. § 8107.

[3] 20 C.F.R. § 10.404 (1999).

[4] *Id.*

[5] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.6(a) (August 2002).

[6] A.M.A., *Guides* 477, Figure 16-43.

[7] *Id.*

flexion for 6.5 percent impairment,[8] and 45 degrees of extension or 0 percent impairment, bilaterally. Appellant demonstrated 16 degrees of external rotation on the right,[9] and 18 degrees on the left, both representing 1 percent impairment. Internal rotation of 10 degrees bilaterally represented 5 percent impairment.[10] The Office medical adviser added the loss of range of motion impairments to find 18 percent impairment to both upper extremities. The medical evidence addressing appellant's upper extremities, as provided by Dr. Zemankiewicz and correlated with the A.M.A., *Guides*, results in 18 percent impairment bilaterally. There is no evidence that appellant has more than 18 percent impairment to each of his upper extremities, for which he received a schedule award.

LEGAL PRECEDENT -- ISSUE 2

Section 8124(b)(1) of the Act provides in pertinent part as follows:

> "Before review under section 8128(a) of this title, a claimant for compensation not satisfied with a decision of the Secretary … is entitled, on request made within 30 days after the date of issuance of the decision, to a hearing on his claim before a representative of the Secretary."[11]

The claimant can choose between two formats: an oral hearing or a review of the written record.[12] The requirements are the same for either choice.[13] The Board has held that section 8124(b)(1) is "unequivocal" in setting forth the time limitation for requesting hearings or reviews of the written record. A claimant is entitled to a hearing or review of the written record as a matter of right only if the request is filed within the requisite 30 days as determined by postmark or other carrier's date marking.[14] However, when the request is not timely filed, the Office may within its discretion, grant a hearing or review of the written record, and must exercise this discretion.[15]

ANALYSIS -- ISSUE 2

The Office issued its schedule award decision on May 3, 2007. Appellant requested an oral hearing on September 11, 2007, more than 30 days after the Office decision. He is therefore not entitled to an oral hearing as a matter of right. On appeal, appellant contended that the Office had waived the time limitation for filing claims for those employees injured in the August 7,

[8] *Id*. at 476, Figure 16-40.

[9] *Id.* at 479, Figure 16-46.

[10] *Id.*

[11] 5 U.S.C. §§ 8101-8193, § 8124(b)(1).

[12] 20 C.F.R. § 10.615.

[13] *Claudio Vazquez*, 52 ECAB 496, 499 (2001).

[14] 20 C.F.R. § 10.616(a). *Tammy J. Kenow*, 44 ECAB 619 (1993).

[15] *Id.*

1998 embassy bombings. He stated that a copy of this document was included in his case record. The record currently before the Board does not contain such a document. Appellant did not explain why any waiver provision for filing acclaim would be relevant to the 30-day provision for requesting a hearing under section 8124. The record reflects that the May 3, 2007 schedule award was properly sent to appellant's address of record in Florida.[16] His request for a hearing was not made until September 11, 2007, more than 30 days following issuance of the schedule award. Therefore, appellant was not entitled to a hearing as a matter of right. Following the determination that his request for an oral hearing was not timely filed, the Branch of Hearings and Review properly exercised its discretion and determined that appellant's claim could be adequately addressed through the reconsideration process.

CONCLUSION

The Board finds that appellant has no more than 18 percent impairment to each of his upper extremities for which he has received a schedule award. The Board further finds that the Branch of Hearings and Review properly denied his request for an oral hearing as untimely.

ORDER

IT IS HEREBY ORDERED THAT the decisions of the Office of Workers' Compensation Programs dated October 24 and May 3, 2007 are affirmed.

Issued: June 19, 2008
Washington, DC

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

[16] Under the mailbox rule, appellant is presumed to have received the schedule award decision and the accompanying appeal rights. *See Joseph R. Giallanza*, 55 ECAB 186 (2003).